

Interpretation of G.S. 105-130.5A

Secretary's authority to adjust net income or require a combined return

How May Secretary Interpret Laws?

- Rulemaking : G.S. 105-262
 - DOR exempt from notice and hearing requirement
 - Requires OSMB to prepare fiscal note and post for at least 60 days
 - Rules Review Commission reviews rule to make sure it is within the agency's authority
- Directive or bulletin: G.S. 105-264
 - May become effective immediately
 - No notice, hearing, comment, or determination that interpretation of law is w/in the agency's authority

Law re: “True Earnings”

- Taxable years beginning before January 1, 2012
 - G.S. 105-130.6, 105-130.15, and 105-130.16
 - Redetermine net income if Secretary finds that report does not reflect corporation’s true earnings in this State
 - No guidance to taxpayers
- Taxable years beginning on or after January 1, 2012
 - S.L. 2011-390
 - G.S. 105-130.5A
 - Redetermine net income if Secretary finds corporation failed to accurately report State income through the use of transactions that lack economic substance or are not at fair market value
 - Issued CD-11-01

Committee Proceedings on CD-11-01

- November 2 and March 7
- Concerns
 - Does the guidance provided in CD-11-01 meet the definition of a rule? (Guidelines to be used for audits are not rules)
 - If it is a rule, should it have gone through rulemaking?
- Prior Legislative Actions on Similar Issue
 - G.S. 105-262(b) provided expedited notice & hearing for rules affecting combination audits
 - S.L. 2010-31 required rules be adopted under APA on combination audits before penalties applied

Rulemaking for Forced Combinations

- Should the Department have to give guidance re: combination audits?
- Should that guidance be in the form of rulemaking?
- If yes, need to balancing objectives:
 - Expediency
 - Opportunity for notice and comment
 - Outside determination that interpretation is within the agency's statutory authority

What Makes the Process Timely?

- Timetable for notice & hearing
- Fiscal Note
 - Revenue must obtain a fiscal note prepared by the OSBM if proposed rule has a substantial economic impact (90 days)
 - Prior to 2011, amount = \$3,000,000
 - Current law, amount = \$500,000
 - Note must be published for at least 60 days
- Delayed effective date if Commission receives written objection from 10 or more people – “Rule subject to legislative disapproval”

DRAFT: *Expedited Rulemaking for Forced Combination*

- Use timetable offered for temporary rule-making
 - Expedited review
 - Commission may not extend period of time for review
- Alter fiscal note requirements
 - Allow agency to prepare
 - Publish fiscal note with rule for 30 days
- Do not provide for a delayed effective date through legislative disapproval
 - Only applies if Commission finds agency acted within its authority
 - issue is whether law should be changed
 - By not delaying effective date, taxpayers have certainty
 - General Assembly may still change the law

Application Beyond Forced Combinations?

- Review by outside authority
- All interpretations subject to Part 3 of Article 2A of Chapter 150B
- Process could be complete in less than two months
- Notice & hearing
- All interpretations must go through rulemaking (*expedited process*)
- Interpretations that expand the scope of a tax or increase the amount of tax due (*105-264(c)*)

Revenue Laws Study Committee: April 11, 2012

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THE END